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Supp. Br. of Bailey, Brown & Henderson for P. & E.

Supreme Court of the United States.

OCTOBER TERM, 1902.

Filed Nov. 18, 1902.

No. 72.

THE TELLURIDE POWER TRANSMISSION COMPANY AND L. L. NUNN, PLAINTIFFS IN ERROR,

v.

THE RIO GRANDE WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF UTAH.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

S. A. BAILEY,
For Plaintiffs in Error.

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THE RIO GRANDE WESTERN RAILWAY COMPANY, DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF, FILED BY PERMISSION OF THE COURT.

MOTION TO DISMISS OR AFFIRM.

Defendant in error has moved to dismiss the writ of error on the ground, among others, that the Fergusons are not joined and no proceedings had in severance. In reply to this we submit:

First. That there has been substantially a severance as to the Ferguson heirs.

Second. That the judgment appealed from was not a joint judgment.

I.

When this action was commenced in the State court the defendants were W. W. Ferguson, The Telluride Power Transmission Company, L. L. Nunn, and L. Holbrook (R., p. 1). The complaint was filed September 12, 1896 (R., p. 14). Summons was served on defendants Holbrook and Ferguson September 14, 1896 (R., pp. 6, 7). Defendant Ferguson answered February 2, 1897 (R., p. 20). March 16, 1897, the death of W. W. Ferguson was suggested as having occurred February 19, 1897, and praying that Sarah F., Frederick, and William Ferguson be substituted as his heirs-at-law as defendants (R., p. 25), and an order to that effect made on the same day. March 29, 1897, the Ferguson heirs filed their answer (R., pp. 33–36). February 2, 1897, defendant Holbrook disclaimed any interest in the controversy, for that purpose joining plaintiffs in error in their answer (R., p. 19).

The Ferguson heirs appeared by King & John, as their attorneys of record, and the record of the trial and bill of exceptions shows no appearance by them at the trial, and there is no testimony in the record given by them or in their behalf; but the controversy, as appears in the detailed account of the trial in the bill of exceptions, was entirely between the defendant in error and the plaintiffs in error. The two orders constituting the judgment in the case were entered April 27, 1898, and May 21, 1898, respectively (R., pp. 48–56). The appeal was taken from the district court to the supreme court of Utah by notice dated October 25, 1898. That appeal was taken by plaintiffs in error only, and was directed to the plaintiff (defendant in error) and to Sarah, Frederick,

and William Ferguson and L. Holbrook, and service was had on all of them October 25, 1898 (R., pp. 57, 58).

The record from the supreme court of Utah shows no appearance whatever by the Ferguson heirs or Holbrook. The first record in the supreme court of Utah is the submission of the cause (R., p. 664), in which the parties are named as "The Rio Grande Western Railway Company, respondent, *v.* The Telluride Power Transmission Company and L. L. Nunn, appellants." It is a minute order in the clerk's record, reciting the fact that the cause came on regularly for hearing and was argued by H. P. Henderson on behalf of appellants and by Robert Harkness in reply, and was submitted and taken under advisement.

The formal judgment of the court was entered, affirming the judgment of the district court (R., p. 664), December 11, 1900. The opinion of the supreme court is given at length under the same title as above (R., pp. 664–672). In that opinion, among other things, the supreme court of Utah says:

"Whether any damages accrued to the Ferguson heirs at the time summons was served in September, 1896, we are not called upon to decide. The damages have been assessed by the jury and paid, *and no appeal has been taken therefrom by them.*"

From this record we insist that substantial proceedings in severance are shown.

The writ of error in this cause is brought to review the proceedings and judgment of an appellate court and not of a court of original jurisdiction. The third district court of the State of Utah was the court of original juris-

diction. Plaintiffs in error sought to review the judgment of that court and appealed to the supreme court of Utah. Pursuant to the practice of that court, they caused notice to be served on every other party in the case, thereby impleading them in the appellate proceedings. The other defendants could have appeared if they cared to appear. Having failed to do so, the case proceeded without them. Defendant in error (original plaintiff) did appear. The other defendants are concluded by the appellate proceedings, and would afterward have no right of appeal to the supreme court of Utah. The judgment of the district court thereby became final as to them. This is in effect stated in the opinion of the court above quoted. Having no further right of appeal to the supreme court of Utah, the Ferguson heirs had no right of appeal from the supreme court of Utah to this court. In other words, there were proceedings equivalent to summons and severance, and they appear of record.

Masterson *v.* Herndon, 10 Wall., 416.

II.

The judgment is not a joint judgment against plaintiffs in error and the Fergusons. The judgment of the supreme court of Utah, which the writ in this case is brought to review, was simply a judgment affirming the judgment of the third district court of Utah. To ascertain what the terms of the judgment are, we must refer to the judgment of the inferior court. That judgment is contained in two entries—one entered April 27, 1898, (R., pp. 48–50), which was by an order of the court set aside, and then, on May 16, 1898, reinstated (R., p. 52); and an-

other entry made May 21, 1898 (R., pp. 56, 57). By the first entry the court finds the facts, and, among other facts, it finds "that neither on, before or since the 8th day of July, 1896, have the defendants The Telluride Power Transmission Company and L. L. Nunn, or either of them, had any possession of the lands sought to be condemned, or by appropriation or otherwise any right to raise the waters of Provo river so as to flow the same or any part thereof, or any right to the said lands or possession thereof as part of a reservoir site."

The court thereupon adjudges that plaintiff is entitled to condemnation upon complying with certain conditions, including the payment of one thousand and seventy-five dollars into court, and reserving the right of defendants thereafter to apply to the court for a distribution thereof.

By the second order the court recites the fact of the entry of the former order, compliance with the conditions by the plaintiff, and then adjudges that plaintiff have condemnation of any and all interests of all defendants. This is the judgment that was affirmed by the supreme court of Utah. It is in no sense a judgment against defendant in error, as contended by it in this court. It is a judgment purporting to give relief against all the defendants in the action, upon conditions imposed on the plaintiff. It will be seen that the court finds, as matter of fact, that plaintiffs in error never had any right to the land whatever, but it grants a decree against them condemning their interest in it. This judgment is not a joint judgment against the Fergusons and plaintiffs in error. It is true that in form it as a decree against several defendants, granting condemnation of any and all interest they may have; but at the same time it decrees that plaintiff in error had

no interest to condemn. It is plain that the court was trying to adjust the decree to the double and inconsistent allegations of the complaint, that the plaintiff (defendant in error) was the owner of the land subject to the payment of damages to the occupant, and the decree finds that plaintiff in error never had any right of possession or otherwise as against the plaintiff, but that Ferguson was in possession at the time suit was brought. As to plaintiffs in error it is made to act as a judgment in ejectment, and of condemnation as to the Fergusons. The judgment shows plainly that the right claimed by the plaintiffs in error, and which was denied to them, is wholly and absolutely a separate, distinct, and independent right from any right taken or condemned from the Fergusons. The judgment requires nothing to be paid, performed, or done by the defendants, jointly or otherwise. It is not a judgment based on any joint obligation express or implied, nor does it affect any joint right; but, on the contrary, it shows plainly that the rights of the Fergusons, if they had any, and the rights of plaintiffs in error were separate and distinct rights and were not held by them in common or jointly.

Simpson *v.* Greeley, 20 Wall., 157.
Germain *v.* Mason, 12 Wall., 259–261.

All the cases cited by counsel in their brief and all cases cited in text books and earlier decisions on that subject are cases where defendants are liable on some joint liability or obligation.

But in truth and in fact, Ferguson and his heirs, after his death, and Holbrook were mere formal parties to the action.

They really had no interest whatever in it. Holbrook had disclaimed, and the judgment of the district court dismissed the case as against him. Ferguson, before his death, had filed an answer, in which he says:

"That defendant in good faith entered upon said premises, with the view to obtaining title thereto as soon as said lands should be entered, and he has from the date of entry upon said premises until the present time, in good faith resided upon said premises, and occupied, possessed and held the same and claimed the ownership and title thereof, against all the world, except that as alleged in said complaint, defendant has contracted with the said defendants The Telluride Power Transmission Company and L. L. Nunn, to sell and dispose of all of said lands, to wit: the said 160 acres, so owned, occupied, held, and possessed by him, for the purpose of enabling the said defendants to use the same for a reservoir upon which to store water for electrical power, manufacturing, and agricultural purposes. That the said defendants have paid to said defendant herein answering large sums of money for his interest, title, and property therein, and the said defendant has promised and agreed by and with the said defendants so named to convey to them by good and sufficient deed, an indefeasible title to said premises. And the defendant occupies and holds said premises subject to said contract. That said defendant at the time of entering upon said premises was and still is a citizen of the United States. That said occupation and possession of said premises was as stated in good faith, and for the purpose of obtaining title from the United States thereto; and said possession and occupation has been notorious, peaceable and exclusive from the time defendant entered thereon, until the present time except as hereinafter stated" (R., pp. 22–25).

The plaintiffs in error do not claim to hold the land in controversy under that contract. They claim to have obtained title to it under section 2339 of the Revised Statutes of the United States by entering upon it and appropriating it as a reservoir site, and this contract only amounted to a waiver of Ferguson's rights as a squatter in favor of plaintiffs in error.

REMOVAL.

Plaintiffs in error filed a petition for removal in the district court of the State (R., p. 8), and the court, upon the hearing of this petition, denied the removal (R., p. 10). The petition was filed upon the ground that a separable controversy existed between plaintiffs in error and defendant in error. The record upon this petition is the complaint and petition, and we submit that, taking them together, and indeed the complaint alone shows a separable controversy, and that the cause should have been removed to the Federal court.

The complaint, in addition to the averments quoted in our original brief, avers (R., p. 3) on information and belief that plaintiff "is the owner of said land necessary for its use subject only to the payment of damages occasioned to the occupant by constructing, maintaining and operating its railroad thereon."

The averments respecting the interest of defendants show conclusively that plaintiffs in error made a claim for a different purpose and based upon a different right from the other defendants. The statement in the complaint amounts substantially to this, that Ferguson was a squatter on unsurveyed lands of the United States; that by contract with

plaintiff in error he had waived his rights as such; that plaintiffs in error claimed the right to the land in controversy as part of a reservoir site and the right to flood the same as such, and the averments show that defendant Ferguson did not join in such claim in any way.

The verified petition for removal does not dispute, but confirms, the allegations of the complaint as to the separate claim of plaintiffs in error for reservoir purposes, and further alleges that all of the right, title, and interest of defendant Ferguson, by the contract with him, referred to in the complaint, was transferred to the plaintiff in error. It is clear that Ferguson was a mere homestead squatter on unsurveyed public land, and that any contract selling or to sell his right would convey nothing and would only be a relinquishment of any right had as such. It is clear from the complaint and petition for removal that he made no claim and never had made any claim except as such squatter. It is equally clear that plaintiff in error did claim the land as part of a reservoir site and that plaintiff, claimed the right to condemn it for railroad purposes, and that controversy was wholly between the plaintiff in error and defendant in error. The land being unsurveyed public land of the United States, and the complaint and petition showing that plaintiffs in error claimed it for a reservoir site, could only mean that they had appropriated it under the laws of Congress, and the statement in the complaint that defendant in error claimed it for railroad purposes could only mean that it claimed the same right. If there was a dispute between them upon that subject it could only be determined by ascertaining which had made the first appropriation, and that was the real and only contro-

versy between them, and this was separable and was purely a controversy between the plaintiffs and defendants in error.

A test of separability which has been suggested in the decisions is that the complaint or petition shall disclose a cause of action in which only the plaintiff and defendant seeking removal are interested. This complaint shows that a cause of action might be based on plaintiff's claim of right to condemn the reservoir site of defendants in so far as there was a conflict between them, and that this was a controversy wholly between them.

It is true that after the denial of the district court to remove the cause to the Federal court plaintiffs in error took a copy of the record and filed it in the Federal court, and the defendant in error there moved to remand, which motion was granted. This only appears in the record of this case by evidence introduced on the trial (R., pp. 61, 62). After the jury were impaneled and the trial commenced, defendant in error offered in evidence a certified copy of the proceedings in the Federal court. He offered it as a fact in the case, and also the opinion of the court upon the proceedings. It was suggested on the argument before this court that the cause having been remanded by the Federal court, and there being no appeal allowed from such an order, that it is not now open to review, and the case of Missouri Pac. R'y Co. *v.* Fitzgerald, 160 U. S., 556, was referred to.

In the statement of facts in that case it appears that although the State court denied the petition for removal in the first instance, it did not assume to retain jurisdiction after the circuit court had made an order denying the motion to remand, but awaited its action; that afterward, when the cause came on for final

hearing, the circuit court determined that it had been improperly removed, and made an order remanding it; that the parties then entered into a stipulation for trial in the State court; that an amended petition and amended answer were filed, but no new petition for removal; that "trial was had as agreed in the district court of Lancaster county, which made a finding of fact, and rendered judgment against the Missouri Pacific Company," which judgment was affirmed by the supreme court of Nebraska (pp. 561, 562). Upon that statement of facts the court held that the order of the State court denying the petition in the first instance had worked no prejudice; that any error in that regard became immaterial, and that the order of the circuit court remanding the cause was not reviewable upon writ of error to the final judgment of the State court (pp. 580–582).

From the statement of facts it plainly appears that the real reason why the ruling of the State court became immaterial was not that it acquiesced in the decision of the Federal court refusing to remand, nor that it proceeded to trial in conformity with the subsequent order of the court remanding the cause, but that the defendant itself submitted to the jurisdiction of the State court. Upon that theory the case is in accord with the other cases which are cited with approval on page 582. Suppose a case where a petition for removal is granted by the State court, and a motion to remand is granted by the circuit court and neither recedes from its position, but both refuse to take jurisdiction—a case which might easily happen—why should not the supreme court under its general supervisory powers decide in a proper proceeding which court had jurisdiction?

The statute of March 3, 1887, provides that no appeal or writ of error from the decision of the circuit court remanding a cause shall be allowed. In this case we do not assign as error the order of the circuit court, but the judgment of the State court denying the right of removal. The proceedings in the Federal court really form no part of the record here. We do not understand that there is anything in the Fitzgerald case which is *contra*. It merely holds that the order of the *circuit court* remanding a cause is not reviewable on writ of error to a final judgment of the State court. If, after final judgment in the circuit court, an order refusing to remand may be reviewed on writ of error or appeal to the Supreme Court, as held in Graves *v.* Corbin, 132 U. S., 571, there would seem to be no reason why, after final judgment in the State court, the action of that court in retaining jurisdiction in a removable cause should not be subject to review in this court.

In the Fitzgerald case it is said that the State court did not deny the possession of the right of removal (p. 582), and this statement is true, since, as shown in the preceding statement, the defendant submitted to the jurisdiction of the State court; but in the case now before the court the plaintiffs in error did not waive their right of removal (p. 61); they were forced into a trial in the State court, and the right in question was denied to them by the State court. The question is jurisdictional.

The Constitution of the United States, which the State judges take an oath to support, must be interpreted by them as well as by the inferior Federal tribunals, and in case of a difference of opinion, the Supreme Court of the United

States, in cases properly before it for adjudication, is the final arbiter.

If there were any case or class of cases in which the orders of the circuit courts remanding causes are final and conclusive, there might be as many conclusive opinions respecting the right of removal as there are district judges of the United States. Uniformity of Federal decision would thus be destroyed, and confusion worse confounded. We cannot think that such is the meaning and effect of the Fitzgerald decision.

PLAINTIFFS IN ERROR CLAIM A RIGHT AND AUTHORITY GIVEN UNDER A STATUTE OF THE UNITED STATES AND THE EQUAL PROTECTION OF THE LAW, WHICH HAVE BOTH BEEN DENIED.

Plaintiffs in error set up in their answer in the State court a right to the land in controversy under the laws of the United States. They set up fully and in detail the facts which would constitute a right under section 2339, Revised Statutes of the United States. It is true that they did not refer by section or title to that particular statute. They did set out that the land was unsurveyed land of the United States, and that they entered upon it and commenced work in such manner and under such conditions as would give them a right to it under that section, and at a time prior to any interest acquired or claimed by defendant in error; and the judgment of the district court, which was affirmed by the supreme court of Utah, was against this title and right thus set up. The right to review this judgment in this court, we claim, is given by both the first and third

subdivisions of section 709, Revised Statutes of the United States. It is not necessary in setting up the claim or authority to point out the particular section of the statute of the United States under which a claim is made, but it is sufficient if the facts alleged constitute a right under a statute of the United States, and with such certainty that the court will be able to see clearly from the whole record that a certain provision of the Constitution or act of Congress is relied on by the party who brings the writ of error.

Bridge Proprietors *v.* Hoboken Co., 1 Wall., 142.
Oxley Stave Co. *v.* Butler Co., 166 U. S., 657–659.
Water Power Co. *v.* Street R'y Co., 172 U. S., 485.
Keokuk & Hamilton Bridge Co. *v.* Illinois, 175 U. S., 627.
Sweringen *v.* St. Louis, 22 Sup. Court Rep., 569–572.

And this right claimed by the plaintiffs in error was not refused upon any finding of fact in the case, but it was refused as a matter of law. The case was tried before a jury, and on the trial plaintiffs in error requested the court to charge the jury as follows:

No. 11. "If defendant Nunn at any time prior to March 24th, 1896, determined to appropriate the waters of Provo river for power purposes, and to build a dam for the purpose of obtaining such power, and commenced work in Provo canyon, and such work plainly indicated such purpose on his part, and was calculated to carry out such purpose, and he was at all times up to the commencement of this suit prosecuting said work with diligence, and if such dam and the power to be generated thereby were reasonable in their extent and purpose, and the erection of such dam would flow the land described, and the plaintiff had knowledge of

this fact on March 24th, 1896, and said plaintiff had not before that date commenced to survey its proposed line of road running over said land, then your verdict should be for the defendant."

No. 12. "If defendant, Nunn, had before March 24th, 1896, formed the purpose in good faith to build a dam in Provo river at or near Hanging Rock to a height of 25 feet, thereby raising the water to that extent and overflowing the land described, and had after such determination commenced actual operation on the ground, fairly and reasonably indicating such purpose, and continued the same with diligence to the commencement of this suit, and the plaintiff before it commenced its work knew of such purpose, then and in that case your verdict must be for the defendant" (R., pp. 674, 675).

And the court refused to give such request or any part thereof. In these requests every element is stated which would constitute a right under section 2339, and the court was asked to declare that as the law, which was refused, and the supreme court of Utah has approved such refusal by its judgment. This was in effect a refusal to state, as matter of law, that a compliance with a statute of the United States would give a right as provided therein, and plaintiffs in error were thereby denied such right. It is claimed by defendant in error that the judgment of the supreme court of Utah was based upon a fact found by it, and the finding stated in the judgment (R., p. 49) as follows is relied upon:

"That neither on, before or since the 8th day of July, 1896, have the defendants The Telluride Power Transmission Company and L. L. Nunn, or either of them, had any possession of the land sought to be condemned, or by appropriation or otherwise any right to raise the waters of

Provo river so as to flow the same or any part thereof, or any right to the said lands or possession thereof as part of a reservoir site, and to raise the waters of said river so as to flow the same would be an unreasonable use of said waters and the public lands and easements in the canyon adjacent to said river."

This is really a conclusion of the court; but the case was being tried before a jury, and plaintiffs in error have a right to have the law stated correctly to the jury and to have the jury find upon that fact; but it was taken from the jury upon the theory that it was a question of law. While the district court gave no reason for this, yet it is apparent that it was because in the judgment of the court the Telluride Power Transmission Company had no right to make the appropriation, and that Nunn was acting for it and in its behalf, and the supreme court of the State of Utah expressly states that that is the reason why that court affirmed that determination (R., pp. 669–671). And the reason given for it is that the power company had not complied with the laws of Utah. The provisions of the Utah statutes upon this subject are given in the briefs on both sides, and it is perfectly apparent from these provisions that they were intended as a protection to creditors of the corporation who might reside in Utah or have occasion to enforce claims against the corporation in Utah. But, however that may be, it did not authorize every person at will to despoil a corporation of property that it had acquired. Even though a corporation is not authorized by law to take and hold property, yet the conveyance to it is not absolutely void. It cannot be questioned by anybody unless he shows some right to question it. It does not mean that every stranger may come

along and despoil the corporation of the property, but only the government can make complaint.

II Morawetz on Private Corporations, §§ 648–653, 709–711, 746.

1 Devlin on Deeds, 121.

California State Tel. Co. *v.* Alta. Tel. Co., 22 Cal., 398.

County of Daviess *v.* Hendekoper, 98 U. S., 628.

The Banks *v.* Politeaux, 15 Amer. Dec., 706; S. C., 3 Rand., 136.

Hickory Farm Oil Co. *v.* R. R. Co., 32 Fed. Rep., 22.

Tarpey *v.* Deseret Salt Co., 5 Utah, 502.

Cowell *v.* Springs Co., 100 U. S., 55.

Bone *v.* Canal Co., 5 Atl. (Pa.), 751.

Jones *v.* Habersham, 2 Sup. Ct. Rep., 389.

If the Power Company or Nunn, or both, had entered the canyon upon unsurveyed public lands and appropriated a reservoir site before the defendant in error had done so, then as to the railroad company, it had title to it. It was their property. And to deny to them, or either of them, the right to make such appropriation denies them the equal protection of the law, and it is a right claimed and acquired by virtue of Federal law.

"The violation of the constitutional provision, when committed by the judicial action of a State, may be, and generally will be, after the trial or final hearing has commenced. It is during the trial or final hearing that the defendant is denied equality of legal protection, and not until then. Nor can he know, until then, that the equal protection of

the laws will not be extended to him. Certainly not until then can he affirm that it is denied."

Virginia *v.* Rives, 100 U. S., 313.

Denying to plaintiffs in error the right to make an appropriation of the public lands of the United States, and permitting the defendant in error, as matter of law, to take the lands from them, is a denial of the equal protection of the laws to the plaintiffs in error, and is in violation of section 1 of the fourteenth amendment of the Constitution of the United States.

THE PLAINTIFF IN ERROR HAS BEEN DEPRIVED OF ITS PROPERTY BY THE ACTION OF THE STATE OF UTAH WITHOUT DUE PROCESS OF LAW.

The provision contained in the fourteenth amendment that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws, gave a new remedy where none existed before—a new protection to all persons under the Federal jurisdiction from arbitrary action on the part of the State governments.

The Supreme Court has made this provision effective in many cases, treating each case on its individual merits, but declining to give any general definition of the term due process of law; and wisely so, for the reason that any attempt at general definition in one case would seem to create confusion rather than clearness when applied to other cases. It would therefore be presumptuous to attempt to give a comprehen-

sive definition that would apply to all cases. Certain elements of definition, however, seem to be settled. Due process of law in a State means proceedings due according to the law of that State. But it is not every deviation from such process or proceedings that necessarily results in depriving a person of his life, liberty, or property. To give jurisdiction to the Federal court it must not only appear that there has been a want of such due process of law or deviation therefrom, but that the necessary result thereof has been to deprive the complaining party of some right protected by this provision of the Constitution. And it may be argued further, that while a court of limited jurisdiction is not to extend its authority in violation of the law creating it, yet a remedial law should be liberally construed, so as to make the remedy effectual wherever substantial rights are involved. It is not only the prerogative, but the duty, of the courts to give full effect to such remedial laws. Furthermore, the provision in question is prohibitory and is therefore self-enforcing.

In this case the trial court in Utah permitted the plaintiff to deny the defendants' title in an action to condemn. That alone, we contend, was not due process of law according to the law of Utah; but we are not in a position to complain of that, because it did not necessarily result in taking away our property. It may be said to be an error in procedure merely. But the trial judge went further and arbitrarily assumed the power to decide the facts on which the defendants' claim was based, found such facts adversely to defendants, and the necessary result was that defendants were deprived of their property without due process of law. Of course, the protection afforded by this provision is a right

which may be waived, and it must appear that there has been no waiver.

The Utah statutes relating to eminent domain, under which this action was brought, are framed on the theory that the plaintiff in a proper case may acquire the title to any property specified in the statute from any and all persons making claim to it. Section 3847 (p. 35 of our brief) provides in clause two that the complaint must contain the names of all owners and claimants, if known, who must be styled defendants. Section 3849 provides that any person, including those who were unknown to plaintiff, claiming the property or damages for the taking, may appear as defendants. Clause 2 of section 3850 following provides that the *court* or judge shall have power to hear and determine all such adverse and conflicting claims to the property and to the damages therefor. This is clearly intended to provide for a case in which several defendants are making conflicting claims among themselves to the property or the damages at the time of the attempted condemnation. It can have no other meaning. And even this section does not provide that the judge alone, without a jury, but that the court or judge, may hear and determine such conflicting claims. If A had an action of ejectment pending against B when C sought to condemn the property, it might be taken, and the rights of both A and B adjudged to C; but the right of B to have the question of his title tried by a jury, if he had such right, would not be taken away by the operation of this statute. Such a construction is impossible. Section 3859 (p. 39 of our brief) of this same title provides that the provisions of the code relative to civil

actions, except as otherwise provided in this chapter, are applicable to and constitute the rules of practice in proceedings in this chapter. Section 3350 (p. 42 of our brief), taken from the Code, provides that in actions for the recovery of specific real or personal property "an issue of fact *must be tried by a jury, unless a jury trial is waived.*"

The right must not be waived, and the violation of it must be alleged as error. That it was claimed at the trial, see pages 595 and 600; on appeal to the State court, page 603; and specified as error, paragraphs numbered 7, 8, and 11 (R., pp. 674, 675). The supreme court of Utah in its opinion did not construe the statutes herein referred to, although they were urged and argued, but merely affirmed the judgment of the lower court. But to say that in every case the construction placed by a State upon its laws is conclusive in the supreme court is to shut the door against review even in the most flagrant violations of constitutional rights, and at least in part to annul this constitutional provision. We submit that all decisions of this court which would seem to contain expressions contrary to the contention here made can be reconciled to it or distinguished as having other sufficient reasons for decision.

The same words which protect life and liberty from arbitrary action on the part of the State protect property, the means whereby we live. If a State judge can arbitrarily deprive a person of his property under guise of judicial proceedings he can as well deprive him of life and liberty.

JUDGMENT IN THE MURPHY CASE IS NOT AN ESTOPPEL IN THIS CASE.

It is claimed by defendant in error that the judgment in the Murphy case operates as an estoppel and that no relief can be granted plaintiffs in error in this case. The Murphy case was not between the same parties; it relates to an entirely different piece of land. It was a different cause of action. The Murphy land adjoins the land in controversy in this case and is situated immediately below it. It was argued upon the hearing that a judgment of this case in our favor could not avail plaintiffs in error. As a matter of law there is nothing in this case to show that it would have any effect whatever, and as a matter of fact the testimony in the case shows that plaintiffs in error were constructing their dam on the Murphy land and that they claimed the right to erect a dam at or near the place called Hanging Rock. This was just below the land in controversy here. It cannot be said, as matter of law, that plaintiffs in error could not erect that dam just above and on the Ferguson land, if they kept it within their original appropriation, and thereby in no way affect the Murphy land. It was also urged that in that case there was an injunction that prohibits the plaintiffs in error from flowing the Murphy land *or any other land by a dam higher than fifteen feet* at the place where the temporary dam was built. If it is claimed that by that injunction we are prohibited from flowing any other land than that involved in that case, it would be wholly without authority and void; it would be upon a subject not involved in the litigation; it would be a subject over which the court had no jurisdiction.

Furthermore, the record in the Murphy case was not introduced in evidence as an estoppel. It was admitted by the court merely as evidence of good faith on the part of the defendant in error. It was not considered by the supreme court of Utah as an estoppel, for the reasons hereinbefore stated.

Respectfully submitted.

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